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December 17, 2019

Via Certified Mail - Return Receipt Requested

David Morris, General Manager
Pacific Coast Coal Company
PO Box 450
30700 Black Diamond-Ravensdale Rd.
Black Diamond, WA 98010

Pacific Coast Coal Company
31615 3rd Ave
Black Diamond, WA 98010

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EPA Region 10
Office of the Regional Administrator

Re: **NOTICE OF INTENT TO SUE UNDER THE CLEAN WATER ACT**

Dear Managing Agent:

We represent Puget Soundkeeper Alliance ("Soundkeeper"), 130 Nickerson St. #107, Seattle, WA 98109, (206) 297-7002. Any response or correspondence related to this matter should be directed to us at the letterhead address. This letter is to provide Pacific Coast Coal Company ("PCCC") with 60 days' notice of Soundkeeper's intent to file a citizen suit against PCCC under Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, for the violations of effluent standards and limitations described below. These violations continue to occur at the John Henry Mine, an approximately 500-acre coal mine located or about 30700 Black Diamond-Ravensdale Road, Black Diamond, WA 98010, which discharges pollutants from at least four point sources to waters of the United States including Ginder Creek, Mud Lake Creek, Rock Creek, Lake 12 and Lake Sawyer. Lake Sawyer then drains to Covington Creek and Big Soos Creek, both tributaries to the Green River, which flows to the Duwamish River, then empties into Puget Sound at Elliott Bay in Seattle.

Soundkeeper asserts violations of "effluent standards or limitations" under 33 U.S.C. § 1365(a)(1) and (f)(1) (unpermitted discharge in violation of the 33 U.S.C. § 1311(a) prohibition) or, in the alternative, (f)(7) (violation of a National Pollutant Discharge Elimination System ("NPDES") permit or conditions thereof). The most recent NPDES permit issued to PCCC for discharges from the John Henry Mine, NPDES Permit No. WA0030830 ("the Permit"), on January 11, 2008. The Permit was then modified on December 28, 2012 but expired by its own terms on January 11, 2013. Since that date, each and every discharge of pollutants from point sources at the facility has been without authorization in violation of 33 U.S.C. § 1311(a). In the alternative, if the Permit is found to be continuing in effect, PCCC has violated and continues to violate conditions of the Permit as described below. All alleged violations are continuing or likely to re-occur.

I. UNPERMITTED DISCHARGES

The CWA, 33 U.S.C. §§ 1311 and 1342, prohibits the discharge of pollutants from point sources to waters of the United States, except as authorized by an NPDES permit.

PCCC has violated and continues to violate Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants from its Black Diamond facility, an approximately 500-acre coal mine commonly referred to as the John Henry Mine 01, located at or about 30700 Black Diamond-Ravensdale Road, Black Diamond, WA 98010 (the "facility" or "site"), to waters of the United States without a valid NPDES permit. The facility subject to this notice includes any contiguous or adjacent properties owned or operated by PCCC.

PCCC discharges pollutants, including industrial stormwater runoff from spoil piles, roads and storage areas as well as pollutants contained in mine dewatering water, from point sources identified by PCCC as Pond B Outfall, Pond F&G Outfall, Pond H1 Outfall, Pond H2 Outfall, Pond I Outfall. B, F & G discharge into Ginder Lake which then discharges into Ginder Creek. Ponds I, H1, and H2 discharge into Mud Lake Creek which discharges into Ginder Creek. Additional outfalls include A and A1 ponds which discharge to tributaries to Lake 12 as well as Pit 1 which discharges into Mud Lake wetland and Mud Lake.

On information and belief, PCCC's discharges include the following pollutants: chromium, copper, zinc, lead, iron, lead, manganese, arsenic, dissolved oxygen, oil sheen, pH, total phosphorus, and turbidity. These unpermitted discharges in violation of the CWA have occurred on dates known to you. Some outfalls are stormwater outfalls that discharge when it rains which includes each day since December 1, 2014 that there was a stormwater discharge from the facility, generally including days on which there has been at least 0.1 inches of precipitation. Precipitation data from Auburn, Washington, identifying such days is appended to this Notice of Intent to Sue. Other outfalls discharge on days known to you or every day during the past five years. The violations alleged in this Notice of Intent to Sue will continue until PCCC obtains and comes into compliance with an NPDES permit authorizing such discharges, or until all unpermitted pollutant discharges are permanently ended.

The CWA, 33 U.S.C. § 1311(a), prohibits discharges of pollutants to waters of the United States from point sources except as otherwise in compliance with Section 402, which provides that the Environmental Protection Agency ("EPA") may issue NPDES permits authorizing discharges. 33 U.S.C. § 1342. The CWA implements a technology-forcing approach under which increasingly stringent NPDES permit requirements are imposed over time. *See Nat. Res. Def. Council, Inc. v. U.S. EPA*, 859 F.2d 156, 211 (D.C. Cir. 1988). Permits issued under Section 402 must be issued for fixed terms not exceeding five years. 33 U.S.C. § 1342(b)(1)(B). But, under the Administrative Procedure Act (APA) and EPA's regulations, the conditions of an expired permit continue until the effective date of a new permit **only if the permittee timely submits an application for a new permit**. 5 U.S.C. § 558(c); 40 C.F.R. § 122.6; WAC § 173-220-180(5); *Ctr. for Env'tl. Law & Policy v. U.S. Fish & Wildlife Serv.*, 228 F. Supp. 3d 1152, 1154-55 (E.D. Wash. 2017).

The NPDES Permit issued by Ecology on January 11, 2008 expired on January 11, 2013. NPDES permits cannot be extended except in compliance with regulatory and permit requirements for a timely and complete application for renewal. PCCC did not submit to Ecology a complete application for renewal. Therefore, the Permit was not extended by operation of 40 C.F.R. § 122.6 or WAC § 173-220-180(5) which require **"timely and sufficient application for the renewal of a permit."** PCCC again did not submit "timely and sufficient application" for renewal prior to January 11, 2018.

As a result, PCCC has not had a valid NPDES permit for the Facility since January 11, 2013, i.e., for almost seven years. Accordingly, PCCC has been discharging pollutants from point sources at the facility without a permit in violation of Section 301(a) of the CWA every day since January 11, 2013. *See* 33 U.S.C. § 1311(a).

The violations alleged in this Notice of Intent to Sue will continue until PCCC obtains *and* comes into compliance with an NPDES permit authorizing such discharges, or until all point source discharges of pollutants are permanently eliminated without chance of recurrence.

II. VIOLATIONS OF PERMIT CONDITIONS (alleged in the alternative)

If a court finds that PCCC's NPDES Permit WA0030830 was or remains in effect to authorize PCCC's discharges, Soundkeeper alleges in the alternative that PCCC has violated and continues to violate conditions of the Permit.

A. EFFLUENT LIMIT VIOLATIONS

To maintain water quality, Condition S1 of the Permit establishes numeric effluent limitations on PCCC's discharges to ensure discharge concentrations meet required standards. Soundkeeper hereby provides notice of its intent to sue PCCC for all numeric effluent limit violations in the past five years, including those listed below.

1. Condition S1.B of the Permit establishes the effluent limitation for the maximum six-month running average phosphorus concentration as 41 µg/L for Outfall B, F, G, H₁, H₂, and I. PCCC has violated this limitation:

<u>Date of Violation</u>	<u>Outfall</u>	<u>Six-month average phosphorus concentration</u> (µg/L)
October 2014	I	47

2. Condition S1.C of the Permit establishes the effluent limitation for the maximum manganese concentration as 0.050 mg/L for Reichert Well, PCCC Well, Station 12-4, and Pit 2. PCCC has violated this limitation:

<u>Date of Violation</u>	<u>Station</u>	<u>Manganese concentration</u> (mg/L)
February 2016	Pit 2	0.0951

3. Condition S1.B of the Permit establishes the effluent limitation for the maximum daily copper concentration as 14.5 µg/L for Outfall B, F, G, H₁, H₂, and I. PCCC has violated this limitation:

<u>Date of Violation</u>	<u>Outfall</u>	<u>Daily maximum copper concentration</u> (µg/L)
December 2016	B	26
October 2018	FG	23

October 2018
November 2018

HI
FG

15
17

B. FAILURE TO INCLUDE AKART IN SWPPP AND IMPLEMENT ON-SITE

Condition S14 of the Permit required PCCC to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”) as specified. Condition S14.A.1 of the Permit specifies that the SWPPP must indicate the best management practices (“BMPs”) necessary to provide all known and reasonable methods of prevention, control, and treatment (“AKART”) and ensure that discharges do not cause or contribute to violations of water quality standards. PCCC not only failed to prepare and implement a SWPPP that specified AKART, but has also failed to ensure discharges do not cause or contribute to violations of water quality standards. These violations of Permit Condition S14 and S14.A.1 are ongoing due to the ongoing requirement to implement AKART.

The CWA requires all dischargers comply with effluent limitations that are based on the best available pollution control technology. 33 U.S.C. § 1311. Washington State’s approach to meeting the requirements of the CWA is a statement of legislative intent defined as AKART. Washington State Department of Ecology, *Water Quality Program Permit Writer’s Manual* (January 2015). In issuing or renewing a permit, Ecology is required to do an AKART analysis for the facility’s operations and incorporate permit terms that take into account AKART. RCW § 90.48.520. Ecology’s January 24, 2018 letter to PCCC discusses how treatment technology has changed since the Permit for the Facility was developed. The current technologies at the site are out of date and do not meet AKART standards.

PCCC’s failure to select and implement BMPs to satisfy AKART include those noted in numerous inspections by Ecology and the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) such as:

- Poor housekeeping and improper storage of noncoal waste (e.g. oil/ lube containers, scrap metal, plastic pipes, tires, old conveyor belts), documented by inspection reports including that of the March 6, 2019 OSMRE Mine Site Inspection by Flynn Dickinson;
- Improper storage of oil containers including a possible leak in storage areas, documented by inspection reports including the June 19, 2019 Ecology Stormwater Compliance Inspection Report signed by Monika Kannadaguli on July 30, 2019;
- Not repairing the berm around the containment area, documented by inspection reports including the June 19, 2019 Ecology Stormwater Compliance Inspection Report signed by Monika Kannadaguli on July 30, 2019;
- Failure to clean up the oil/fuel storage area, documented by inspection reports including the June 19, 2019 Ecology Stormwater Compliance Inspection Report signed by Monika Kannadaguli on July 30, 2019;

- Failure to collect all metallic waste and dispose of it properly, documented by inspection reports including the June 19, 2019 Ecology Stormwater Compliance Inspection Report signed by Monika Kannadaguli on July 30, 2019;
- Failure to designate an area for staging and repair of equipment. During the March 26, 2019 and the June 19, 2019 inspections, Ecology noted that the same truck with a 3ft by 3ft large puddle of greasy lubricant oil was parked on the service road (See the March 26, 2019 Stormwater Compliance Inspection Report by Monika Kannadaguli on April 22, 2019);
- Lack of signage at each point of access from public roads that include the names, business address, telephone number, and OSMPRE permit number as required by 30 C.F.R. § 816.11(c), documented by inspection reports including that of the March 6, 2019 OSMRE Mine Site Inspection by Flynn Dickinson;
- Lack of perimeter markers as required by 30 C.F.R. 816.11(d), documented by inspection reports including that of the March 6, 2019 OSMRE Mine Site Inspection by Flynn Dickinson;
- Failure to clear the diversion ditch on the north side of Spoilpile 3 South and the clear water diversion ditch adjacent to SE Green River Gorge Rd as required by 30 C.F.R. § 816.43(a)(2), documented by inspection reports including that of the March 6, 2019 OSMRE Mine Site Inspection by Flynn Dickinson;
- Failure to maintain Pond H2 including failure to clean up fallen trees and trees growing out of its embankment, documented by inspection reports including that of the March 6, 2019 OSMRE Mine Site Inspection by Flynn Dickinson;
- Failure to repair potholes on roads, including the primary entrance road, road to Pit 1, road to Pit 2, and other areas, documented by inspection reports including that of the March 6, 2019 OSMRE Mine Site Inspection by Flynn Dickinson; and
- Failure to upgrade wheel wash to meet BMP C106: Wheel Wash in the latest version of Ecology's *Stormwater Management Manual for Western Washington*, Volume II, 30 days prior to resumption of the use of the wheel wash as required by Condition S8. In the June 19, 2019 Stormwater Compliance Inspection Report, Ecology found that PCCC failed to repair the Truck Washing Area after the March 26, 2019 inspection and oily runoff was still discharging into the Clean Water Diversion Ditch (See the June 19, 2019 Ecology Stormwater Compliance Inspection Report signed by Monika Kannadaguli on July 30, 2019).

These violations constitute a failure to implement BMPs to satisfy AKART, in violation of Permit Condition S14. and S14.A.1, which are ongoing.

C. FAILURE TO UPDATE SWPPP

Condition S14.A.4 requires PCCC to update the SWPPP whenever there is a change in design, construction, operation, or maintenance, which causes the SWPPP to be less effective in controlling the pollutants. PCCC has not prepared and implemented a SWPPP that specifies changes the Facility, including, but not limited to the addition of new outfalls and changes in activities onsite including reclamation. (See permit application attached to PCCC's March 19, 2018 letter to Ecology and PCCC's February 6, 2019 letter to Monika Kannadaguli at Ecology in which PCCC stated they are in the process of initiating final reclamation of Pit 1 and will discharge through a new spillway into Mud Lake wetland and Mud Lake Creek). These violations of Permit Condition S14.A.4 are ongoing until PCCC implements a sufficient SWPPP.

D. FAILURE TO IMPLEMENT BMPs CONSISTENT WITH SWMMWW IN SWPPP AND ON-SITE

Condition S14.A.6 of the Permit requires that BMPs in PCCC's a permittee's SWPPP be consistent with the Stormwater Management Manual for Western Washington ("SWMMWW"), which is available on the internet at <http://www.ecy.wa.gov/programs/wq/stormwater/manual.html>. The SWPPP must also include the technical basis for the selection of all stormwater BMPs (scientific, technical studies, and/or modeling), which support the performance claims for the BMPs being selected,) as well as an assessment of how the selected BMP will satisfy AKART requirements and the applicable federal technology-based treatment requirements under 40 C.F.R. § 125.3. PCCC has not prepared and implemented a SWPPP that includes the technical bases for all stormwater BMPs or assessed how the selected BMPs will satisfy AKART.

PCCC's failure to select and implement BMPs consistent with the SWMMWW or that will satisfy AKART include those listed above in Section B of this letter. These violations of Condition S14.A.6 of are ongoing.

E. RECORDING VIOLATIONS

Condition S3.C of the Permit requires that for each measurement or sample taken, PCCC shall record the following information: (1) the date, exact place, method, and time of sampling or measurement; (2) the individual who performed the sampling or measurement; (3) the dates the analyses were performed; (4) the individual who performed the analyses; (5) the analytical techniques or methods used; and (6) the results of all analyses. PCCC violated this Condition when they failed to record the minimum, maximum, *and* average values on their DMRs for monitoring points B, FG, H1, H2, and I during May 2015, June 2015, July 2015, August 2015, September 2015, April 2016, May 2016, June 2016, July 2016, August 2016, September 2016, June 2017, July 2017, August 2017, September 2017, October 2017, May 2018, June 2018, July 2018, August 2018, September 2018, May 2019, June 2019, July 2019, August 2019, and September 2019. These violations continue to occur every time that PCCC fails to record this information.

III. CONCLUSION

The above-described violations reflect those indicated by the information currently available to Soundkeeper. These violations are ongoing. Soundkeeper intends to sue for all violations, including those yet to be uncovered and those committed after the date of this Notice of Intent to Sue.

Under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), each of the above-described violations subjects the violator to a penalty of up to \$37,500 per day for each violation that occurred through November 2, 2015, and \$54,833 per day for each violation that occurred thereafter. In addition to civil penalties, Soundkeeper will seek injunctive relief to prevent further violations under Sections 505(a) and (d) of the CWA, 33 U.S.C. § 1365(a) and (d), and such other relief as is permitted by law. Also, Section 505(d) of the CWA, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs, including attorney's fees.

Soundkeeper believes that this Notice of Intent to Sue sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit against PCCC under Section 505 of the CWA, 33 U.S.C. § 1365, for violations.

Sincerely,

Smith & Lowney, PLLC

By: 

Richard Smith

Meredith Crafton

cc: Andrew Wheeler, Administrator, U.S. EPA
Chris Hladick, Region 10 Administrator, U.S. EPA
Maia Bellon, Director, Washington Department of Ecology
Barry C Kombol, Registered Agent, PO Box 100, Black Diamond, WA 98010